Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1977

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NO. 77-831

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LO-VACA GATHERING COMPANY,
Petitioner,

V.

THE RAILROAD COMMISSION OF TEXAS,
Respondent

* * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS OF THE UNITED STATES

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

DAVID HUGHES
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent
Railroad Commission of Texas

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* * *

Respondent, Railroad Commission of Texas respectfully prays that this Petition for Writ of Certiorari be denied. The opinion of the Temporary Emergency Court of Appeals of the United States below, dismissing Petitioner's complaint for want of jurisdiction, correctly resolved the issues raised by Petitioners.

QUESTION PRESENTED

Is the Temporary Emergency Court of Appeals of the United States limited to the review of federal agency orders and actions taken by the administrator of the Emergency Natural Gas Act of 1977?

STATEMENT OF THE CASE

Lo-Vaca sought in the Temporary Emergency Court of Appeals ("TECA") to have certain orders issued by the Railroad Commission of Texas (Commission) set aside on the grounds that they conflicted with orders issued by the Administrator Richard Dunham under the Emergency Natural Gas Act of 1977 ("ENGA"). Lo-Vaca filed its complaint purportedly pursuant to Section 10(b) of ENGA, Respondent contends, which does not contemplate the filing of the instant complaint and does not authorize the exercise of TECA's judicial power to entertain this suit as a trial court on the merits or issue a binding decision thereon.

Lo-Vaca voluntarily negotiated and agreed privately for the arrangement of transportation of natural gas to the Northeastern section of the United States. Approval of such transportation was conducted as an exemption from interstate regulation through congressional action and presidential validation duly carried out by Richard L. Dunham, administrator of ENGA. No complaint was made by Lo-Vaca before Administrator Dunham that the order issued by the Commission conflicted with such orders of the Administrator. The only action taken by Lo-Vaca in a federal forum was an attempt at filing an original complaint for a trial upon the merits before TECA.

The order of the Commission did not regulate the terms and conditions of the contracts for transportation of gas by Lo-Vaca. What the Commission's order did was merely to freeze the expenditures of monies collected. Lo-Vaca was not ordered to charge a different rate for the transactions approved by Administrator Dunham. TECA dismissed Lo-Vaca's appeal from the Commission's action on the basis it did not have jurisdiction. Judge Jamison filed a concurring opinion

indicating that he would dismiss the complaint of Lo-Vaca on the merits in favor of the Commission (TECA opinion at 11).

REASONS FOR DENYING THE WRIT

I.

TECA IS NOT A TRAIL COURT

Section 10(b) of the ENGA does not contemplate the filing of an original complaint nor the exercise of judicial power by TECA to entertain a suit on its merits. Courts of Appeal, the statutory courts created by Congress pursuant to Article III, Section 1 of the United States Constitution, have no jurisdictional power other than those specifically vested by Congress *Cary v. Curtis*, 44 U.S. (3How) 236 (1845). TECA, while established as a court of appeals, was given specialized jurisdiction by Congress under the Economic Stabilization Act of 1970, as amended[1] to enforce economic controls imposed under such Act. Section 10(b) of ENGA provides that TECA "shall have exclusive original jurisdiction to review all civil cases and controversies under the act, including any order issued, or other action taken, under this Act." 15 U.S.C. §717 Note (Supp. I. 1977).

In creating TECA, Congress explicitly stated that except as to the prohibition of the issuance of an interlocutory decree staying or restraining any provision of the Economic Stabilization Act or regulation or order issued thereunder, that TECA shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it under Section 211 of the Economic Stabilization Act. TECA has

[1]P.L. 92-210, 85 Stat. 743, §211(b), 12 U.S.C. §1904 note.

subsequently been granted exclusive jurisdiction over all appeals in the district courts in cases arising under the Emergency Petroleum Allocation Act of 1973, as amended.[2] Therefore, since the time of its creation and thereafter, TECA has served as an appellate court to review the record in cases filed before it in accordance with the grant of jurisdictional power contained in the referenced statutes. It is true that TECA was given its grant of jurisdiction under ENGA during a period of crisis stemming from curtailment of natural gas supply in the interstate market, but did not mean the essential function of the court was to be changed when Lo-Vaca asked TECA to convert itself into a trial court to develop facts, hold evidentiary hearings and otherwise consider an original complaint seeking resolution of an alleged conflict between a state regulatory commission and its intra-state regulated utility. Since there was no record to review other than the record made before the Commission, Lo-Vaca attempted to reform TECA's appellate function by obtaining a pre-hearing conference and hearing before the court. See Lo-Vaca's Motion for Pre-hearing Conference and Extension of Time, TECA Docket No. 5-23.

The statutory grant of jurisdiction to TECA under Section 10(b) of the ENGA parallels that given the district court under Section 211 of the Economic Stabilization Act. As the TECA original at 6 points out:

> "Though both courts entertain original complaints, the jurisdiction of TECA under the ENGA is not so broad as that of the district court under the Emergency Stabilization Act."

Section 210(a) of the Economic Stabilization Act, 12 U.S.C. §1904 note (Supp. 1977), created a private cause

[2] 15 U.S.C. §751, *et. seq.*

of action against another private party for any person suffering legal wrong under the statute. *Griffin v. United States*, 537 F.2d at 1130, 1134-36 (TECA 1976). Section 211(a) of the Economic Stabilization Act, 12 U.S.C. §1904 note (Supp. 1977), provided a separate remedy, which is available for a plaintiff subject to price control having a complaint against the enforcing agency or for other plaintiffs who have been aggrieved by former decisions or orders which denied administrative relief for which they believed they were entitled under the act. *Air Products and Chemicals, Inc. v. United Gas Pipeline Co.*, 503 F.2d 1060, 1063, (TECA 1974). As the TECA opinion forcefully points out, ENGA envisioned no such private cause of action as set out in §210 of the Economic Stabilization Act and therefore, is totally distinguishable from the section cited by Lo-Vaca. The illogical parallel that Lo-Vaca draws at page 8 of its Petition seems to be that Congress did not want to burden TECA with criminal prosecutions under the Act but TECA was to take responsibility for all civil matters. This has nothing to do with the private remedies under the Economic Stabilization Act which TECA clearly held were not provided for under the ENGA.

In determining the types of cases that TECA may review, as pointed out in its opinion at 7, "Section 10(b) extends jurisdiction to (1) cases and controversies under this Act, (2) *including* any order issued, or other action taken under this Act." (Emphasis added). While Lo-Vaca argues that the work "including" in Section 10(b) of ENGA is not a word of limitation, Lo-Vaca does not point out why TECA was wrong in its interpretation, nor does it even discuss the word "including" that is used in the Economic Stabilization Act. In *Air Products and Chemicals, Inc. v. United Gas Pipeline Co.*, 503 F 2d at 1063 (TECA 1974), "including" has been interpreted to mean a review of federal

administrative decisions only or action taken under the statute itself. We agree with the TECA that it is reasonable to conclude Congress intended to restrict Section 10(b) of ENGA in the same fashion that it limited jurisdiction under the Economic Stabilization Act. The legislative history of Section 10(b) reinforces this conclusion. As originally introduced in each house of Congress, Section 10(b) gave TECA:

> ". . . exclusive original jurisdiction to review any order issued or other action taken under this Act."

123 Cong. Rec. S. 1540 (daily ed. Jan. 26, 1977) (Remarks of Sen. Stevenson). TECA opinion at 8.

The addition of the phrase "case or controversies arising under the Act" as a simple technical amendment operated only to conform the jurisdictional grant of Section 10(b) to the basic requirements of federal jurisdiction as contained in Article III of the U.S. Constitution. Thus, the amendment was designed to restrict TECA's power to review "any order issued or action taken under the Act".

II.

RAILROAD COMMISSION ORDERS DO NOT CONFLICT WITH ORDERS OF ADMINISTRATOR

Before getting swept up with the Lo-Vaca argument that Sections 6 and 14 of the Act vests in the administrator comprehensive powers to make emergency allocations of natural gas, it is well to remember that Section 6 of TECA primarily empowers the President and his designate, the Administrator, to authorize any interstate pipeline or local distribution company to contract for emergency supplies of natural

gas at prices he deems appropriate. Nothing is mentioned relative to the allocation of revenues arising from the transportation of such supplies. It is equally clear the Commission did not interfere with the allocation, emergency delivery, transportation or purchase of natural gas by establishing a program in any of these areas prohibited by Section 14 of the Act. There is no provision in Section 14 of the Act which would place revenues in the category of "transportation" or "program for delivery". Allocation of transportation costs is not authorized under the Natural Gas Act. Supplemental Emergency Order of the Administrator, Docket No. E77-83, issued June 10, 1977, (Appendix 1). The Administrator authorized Transco to collect, subject to refund, proposed transportation rates for gas transported as agent for its customers and for others. Such action was protested along with the allocation of transportation costs for Transco's interstate transportation of emergency gas purchased under the authority of ENGA. The Administrator held that the allocation of transportation costs was not authorized under ENGA in that the statute does not specifically declare how an interstate pipeline's transportation costs are to be allocated in a rate proceeding under the Natural Gas Act, 15 U.S.C. Section 1717, *et seq.*

> "As administrator, I exercise that authority vested in the President by Section 6 of the Act; however, that authority *does not include the allocation of transportation costs* under the Natural Gas Act. The allocation of transportation costs is a matter to be considered by the FPC (Federal Power Commission), and the pleadings in this proceeding demonstrate that the FPC is considering the allocation of Transco's transportation costs including the question whether any of such costs should be allocated to the Section 6 gas transported by Transco."

> Page 4 of Order, (Appendix 1). (Emphasis added).

If the FPC rather than the Administrator is vested with the jurisdiction to determine the allocation of transportation costs, then the corollary that logically follows is that a pipeline which is not regulated by the FPC but subject to state regulation, (in this instance Lo-Vaca), will have its transportation costs allocated in accordance with normal procedure by the appropriate state regulatory authority. If there had been such interference with Administrator Dunham's order, as Lo-Vaca amazingly asks this Court to assume occurred, then Lo-Vaca should have appeared before Administrator Dunham to complain rather than trying to bring an original proceeding before TECA. It is obvious that Lo-Vaca could not show any such conflict and did not want to risk a contrary finding by appearing before the Administrator, the person who had jurisdiction to hear the original complaint. We believe that the TECA court succinctly concluded the matter correctly when it stated:

> "After studying the legislative history, the language of the act and judicial construction of acts similar to the ENGA, we find that Congress meant for TECA to have no jurisdiction over an original complaint challenging an order of the State Regulatory Commission." Original opinion at 9.

III.

CASE OF FIRST IMPRESSION

Lo-Vaca argues under its Point 2, page 8 of its Petition, that this case is an unusual one. It is submitted the only thing unusual about it is Lo-Vaca's effort to bring an original complaint before TECA. If it can be

fairly said that the litigation presently before the Court is unique, it is equally obvious that the exact facts may not be repeated again, they being peculiar to this case. The Court should avoid cases which present fact situations that are not likely to occur again. While the legal questions presented may be interesting in an academic sense, rules of law announced in an atypical case such as this may cause lower courts to unwittingly make "bad law" in the typical cases.

CONCLUSION

For all of the reasons stated above, Respondents respectfully submit that TECA correctly dismissed Petitioner's complaint, as amended, for lack of jurisdiction and that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

DAVID HUGHES
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent
Railroad Commission of Texas

CERTIFICATE OF SERVICE

I, the undersigned, counsel of record for Respondent, hereby certify that on this the *9th* day of January, 1978, I have served by mail, postage prepaid, copies of the foregoing to counsel for Petitioner.

DAVID HUGHES
Assistant Attorney General

APPENDIX 1

Docket No. E77-83

ADMINISTRATOR
EMERGENCY NATURAL GAS ACT
OF 1977

SUPPLEMENTAL EMERGENCY ORDER
PURSUANT TO SECTION 6
OF PUB. L. 95-2

By order issued April 4, 1977, pursuant to Section 6 of the Emergency Natural Gas Act of 1977 (Act), Pub. L. 95-2 (91 Stat. 4 (1977)), Transcontinental Gas Pipe Line Corporation (Transco) was authorized to collect, subject to refund, proposed transportation rates for the transportation of (i) gas purchased under the Act by Transco as agent for its customers and (ii) gas transported for others. The rates to be charged for such service will be determined in Transco's pending Federal Power Commission (FPC) rate proceedings.

On April 5, 1977, Public Service Company of North Carolina, Inc. (Public Service), Piedmont Natural Gas Company, Inc. (Piedmont), and North Carolina Natural Gas Corporation (NCNGC) [collectively the "North Carolina Companies"] protested the filing. The North Carolina Companies stated that (i) the charges would make most emergency gas unsalable in North Carolina, (ii) the charges are not necessary to recoup any costs associated with this transportation, and (iii) the filing is inconsistent with orders issued in Docket No. E77-58

and other proceedings under the Act.[1] On April 6, 1977, the North Carolina Companies petitioned for rehearing of the April 4 order on the grounds that Section 6(b) (2) (91 Stat. 4, 8) prohibits the FPC from causing Transco to suffer undercollections. Also, on April 11, 1977, United Cities Gas Company (United Cities) protested Transco's filing on the grounds that it results in a price level which is unfair and inequitable and requested that such charges not be permitted to become effective. Transco answered the above filings on May 9, 1977.

By letter order issued April 27, 1977, the FPC rejected Transco's filing in Docket No. RP77-48, which was the basis for Transco's April 1, 1977 filing in this proceeding.[2] On May 23, 1977, the FPC denied Transco's petition for rehearing of the April 27, 1977 order.[3]

On June 1, 1977, Transco proposed new transportation rates, effective April 1, 1977, equivalent to the rates in effect, subject to refund in FPC Docket No. RP77-26. These rates are 28.2 cents, 29.8 cents and 31.5 cents per MMBtu for Rate Zones 1, 2 and 3, respectively.

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[1]The North Carolina Companies amended this filing on April 19, 1977, and attached an order of the North Carolina Utilities Commission which authorized Public Service to price gas purchased under the Act on a rolled-in rather than incremental basis.

[2]The North Carolina Companies and United Cities urged rejection of Transco's filing on the basis of this order in filings submitted May 2 and May 3, 1977, respectively.

[3]On May 24 and May 27, 1977, the North Carolina Companies and United Cities urged rejection of Transco's filing on the basis of this order.

On June 3, 1977, the North Carolina Companies opposed Transco's June 1 request on the grounds that (i) the imposition of transportation charges in addition to the incremental cost of emergency gas results in an unfair burden on the high priority customers of the North Carolina Companies; (ii) the transportation rates would yield revenues greatly in excess of Transco's claimed costs; (iii) Transco is protected from undercollections by Section 6(b) (2); (iv) there is no incremental transportation costs other than fuel; and (v) the North Carolina Companies have submitted expert testimony in FPC Docket No. RP76-136 demonstrating that incrementally priced gas should not be burdened with transportation costs where such costs affect the marketability of such gas.

The April 4 order accepted Transco's original rates "subject to refund pending the resolution of Transco's FPC rate proceedings in Docket Nos. RP76-136, RP77-26, and RP77-48 . . . ." The rejection of Transco's filing in FPC Docket No. RP77-48 automatically rejected Transco's April 1, 1977 filing in this proceeding. Thus, the only pending matter is Transco's June 1, 1977 filing and the North Carolina Companies' June 3 opposition to that filing.

The first, second, fourth and fifth points raised by the North Carolina Companies are matters to be decided in the FPC rate proceedings. The FPC must determine whether emergency gas volumes transported through Transco's system should bear a part of the costs of such pipeline. According to the North Carolina Companies' June 3 opposition, testimony and evidence regarding these matters have been submitted in Transco's FPC rate proceedings in Docket No. RP76-136, *et al.* Therefore, I find no basis for considering such points a second time in this proceeding.

The third point raised by the North Carolina Companies requires an interpretation of Section 6(b)(2) of the Act which reads as follows:

> In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred pursuant to subsection (a).

The North Carolina Companies assert that this section protects Transco from undercollections if the FPC allocates costs to the transportation of emergency gas. The North Carolina Companies' interpretation is erroneous.

Section 6(b) (2) applies to amounts incurred pursuant to Section 6(a). Section 6(a) relates to the purchase, not the transportation, of emergency supplies of natural gas. Matters relating to the transportation of emergency gas supplies are covered by Section 6(c) (1). The Act does not state how an interstate pipeline's own transportation costs are to be allocated in a rate proceeding under the Natural Gas Act (15 U.S.C. § 717, *et seq.*). As administrator, I exercise that authority vested in the President by Section 6 of the Act; however, that authority does not include the allocation of transportation costs under the Natural Gas Act. The allocation of transportation costs is a matter to be considered by FPC, and the pleadings in this proceeding demonstrates that the FPC is considering the allocation of Transco's transportation costs including the question whether any of such costs should be allocated to the Section 6 gas transported by Transco.

Pursuant to § 6(c) (1) of the Act (91 Stat. 4, 8), I authorize Transco to collect the transportation rates proposed in its June 1, 1977 filing for all volumes purchased for others pursuant to § 6(a) of the Act (91 Stat. at 7-8) and transported by Transco. Such rates shall be collected subject to refund pending the resolution of Transco's FPC rate proceedings in Docket Nos. RP76-136 and RP77-26 and any other FPC rate proceeding applicable to the period during which these transportation services are rendered.

This order is issued pursuant to the authority delegated to me by the President in Executive Order No. 11969 (February 2, 1977), and shall be served upon all parties in Docket No.s E77-14, E77-18, E77-20, E77-34, E77-40, E77-41, E77-42, E77-58, E77-63 and E77-72. This order shall also be published in the *Federal Register.*

This order and authorization granted herein are subject to the continuing authority of the administrator under P.L. 95-2 and the rules and regulations which may be issued thereunder.

S/S

Richard L. Dunham
Administrator

June 10, 1977